Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

OCTOBER TERM 2008

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QUINNE POWELL,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD WILLSTATTER
Counsel of Record
GREEN & WILLSTATTER
Attorneys for Petitioner
Quinne Powell
200 Mamaroneck Avenue – Suite 605
White Plains, New York 10601
(914) 948-5656

—♦—

SW
St. Louis West, Inc. (4680)
NY (212) 684-3117 NJ (201) 863-8133
Printed on Recycled Paper

Questions Presented

1. Whether a government witness may testify that the cooperating witnesses were telling the truth where his opinion was based on information to which the jury was not privy?

2. Whether a RICO enterprise must have some structure?

Parties to the Proceeding in the Court of Appeals

The appellants were Quinne Powell and Damon Walker while the appellee was the United States of America. Walker will file his own petition.

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2. *United States v. Powell*, 2006 U.S. Dist. LEXIS 68569 (D. Conn. Sept. 7, 2006), 3:99cr264 (AHN)

Constitutional Provisions, Statutes and Regulations Involved in the Case

Constitutional Provisions

Amendment V states, in pertinent part:
No person shall . . . be deprived of life, liberty, or property, without due process of law.

Amendment VI states, in pertinent part:
In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him[.]

Federal Rules of Evidence

Fed. R. Evid. 602
Lack of Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule

is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Fed. R. Evid. 608(a)
Evidence of Character and Conduct of Witness
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Fed. R. Evid. 701
Rule 701. Opinion Testimony by Lay Witnesses
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 702
Testimony by Experts
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as

an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Statutes

18 U.S.C. § 1962(c) provides, in pertinent part:
It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern
of racketeering activity ....

18 U.S.C. § 1961(4), defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity" and, "any union or group of individuals associated in fact although not a legal entity."

IN THE
SUPREME COURT OF THE UNITED STATES

QUINNE POWELL,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, Quinne Powell, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered January 23, 2008.

Richard D. Willstatter was retained to represent Mr. Powell in the United States Circuit Court of Appeals.

Opinion below and Jurisdiction

On January 23, 2008, the Court of Appeals entered a published opinion [Docket No. 05-6701 (Lead), 06-0132 (con)] affirming the judgment of conviction rendered against Quinne Powell, in the United States District Court for the District of Connecticut (Nevas, J.). App. 1a-15a. Powell's petition for rehearing and rehearing *en banc* was denied on August 22, 2008. App. 33a. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254, subd. 1.

Statement of the Case

This petition seeks review of an order of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court, District of Connecticut, entered January 6, 2006, imposing a sentence of life imprisonment to be followed by a five-year term of supervised release, a special assessment of $800 and a fine of one hundred thousand dollars. Petitioner is serving the sentence.

Quinne Powell was convicted, after a jury trial, of RICO in violation of 18 U.S.C. §1962(c), RICO conspiracy in violation of 18 U.S.C. § 1962(d), three counts of conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846, two counts of witness tampering in violation of 18 U.S.C. § 1512(b)(3) and conspiracy to commit money laundering in violation of 18 U.S.C. § 1956.

The Trial Evidence

At trial, the government offered evidence that its agents had traveled to the city of Bridgeport, Connecticut to investigate narcotics activity there. The agents met with and interviewed numerous police officers who gave them extensive historical information concerning the nature of the crack cocaine trade in that city, the specific locations at which crack was sold, and the identities of the offenders, among other things. The agents sought and acquired police reports reflecting law enforcement activities over the years, including arrests made. A Bridgeport Detective testified that he combed the city's police reports and interviewed witnesses. The case agent testified that he and his team of law enforcement officials "depended heavily" on unsworn statements from numerous Bridgeport officers who reportedly "knew a lot of the players."

In an effort to justify its use of offenders as witnesses, the government adduced testimony, over objection, from a police sergeant that "only someone with firsthand knowledge who actually participated in the preparation, packaging and obtaining of narcotics would be in a position to come to court to testify."

The case agent explained that he and the other agents then approached selected offenders and offered to permit them to cooperate. The case agent testified that the cooperators were told that if they gave truthful information, the government would file a motion to permit the sentencing court to consider a lower

sentence. The case agent also said that the government was required to disclose any favorable information to the defendants on trial.

The case agent testified over objection that in this case most of the cooperators had an "excellent idea of what was going on" in the housing project in which it was alleged the defendants sold crack. The case agent said that, as a result of his extensive investigation, his teams had a "pretty good foundation of what was out there." The agent explained that when the agents "feel comfortable that [the cooperators are] being truthful . . . my answer is 'Hey as long as you're honest, you know, we'll tell the court what your role was, you know, throughout the investigation.' And I mean, the final decision will be by their judge."

The agent recounted how he recruited a number of cooperators who, he claimed, "saw what was going on" and were "privy to violence, you know, drug trafficking, you know, in the area." The agent recounted, by way of example, that he "spent quite a bit of time picking [one cooperator's] brains on his involvement, how he'd meet [individuals in the investigation], you know, what role he'd had; you know, just numerous."

Having given the jury this extensive information, ostensibly on the background of the investigation, the case agent testified that, having learned a great deal from the local police, the arrest records, and other offenders, he and his fellow agents were in a position to

know "90-95% of the time" whether the putative cooperators were telling the truth. Powell's timely objection to this inadmissible testimony was erroneously overruled. Defense counsel moved to strike the offending comments because the witness was improperly "passing judgment on the credibility of witnesses."

The Indictment alleged the defendants participated in a racketeering enterprise from 1990 to November 2001, at a variety of locations including the P.T. Barnum housing project. The federal investigation commenced in 1999 and, accordingly, nearly all the evidence was an historical rendition by cooperating witnesses corroborated to a limited degree by police testimony concerning arrests and investigations they conducted. Quinne Powell, who was detained on this case in December 2000, had no prior arrests. Without a doubt, the government's case could not have been proven without the cooperators' testimony.

Many of the cooperating witnesses themselves were facing long periods of imprisonment unless they succeeded in convincing the government they should receive motions for downward departures pursuant to U.S.S.G § 5K1.1 and motions for relief from harsh mandatory minimums pursuant to 18 U.S.C. § 3553(e). The remaining cooperators testified under the threat of federal prosecution. The cooperating witnesses each related a litany of serious crimes they had committed and sought to blame the defendants whenever possible. Defense counsel made efforts to confront these people

concerning their penchant for dishonesty and motive to curry favor with the government.

The Jury Instructions

A visiting judge instructed the jury. Regarding the proof required to prove the existence of a RICO enterprise, the court instructed the jury:

> An enterprise may include a group of people who have associated together for a common purpose of engaging in a course of conduct over a period of time. . . .This group of people, in addition to having a common purpose, must have an ongoing organization, either formal or informal, and it must have personnel who function as a continuing unit.

There was no instruction that the enterprise had to have any ascertainable organizational structure separate and beyond that necessary to engage in the pattern of illegal racketeering activity. There was no objection.

The Verdict and Sentencing Proceedings

Powell was convicted of substantive RICO, RICO conspiracy, conspiracy to distribute 50 grams or more of crack cocaine, obstruction of justice, and conspiracy to commit money laundering. He was acquitted of substantive VICAR murder charges.

On January 4, 2006, the district judge sentenced Powell to serve life in prison on counts 1, 2, 3, 4 and 6 concurrent with 10 years on counts 9 and 12 and twenty years on count 13. Powell was also ordered to pay a $100,000 fine.

In September 2006, the district court gave its reasons for denying Powell's motion for a new trial.

The Court of Appeals Decision

Powell challenged the district court's admission of the case agent's opinion evidence on appeal. The Second Circuit issued a summary order finding that the case agent's testimony was fully admissible despite the defendant's timely objection:

> It was not an abuse of discretion to allow Agent Tyrrell's testimony at trial. *See United States v. Dwyer*, 539 F.2d 924, 927 (2d Cir. 1976) (decisions about whether to exclude relevant evidence are reviewed for abuse of discretion). Tyrrell was describing generally the process of locating and debriefing cooperating witnesses when he said that "90 [to] 95 percent of [the] time we know if they're telling the truth or not. If they're not, you know, we'll . . . sit down, you know, we'll step away and we'll figure out what we're going to do. But in this investigation, most of the guys that – the cooperators

> that we dealt with, we had – an excellent idea of what was going on, you know, in P.T. Barnum." It was within the district court's discretion to conclude that in so testifying Tyrrell was not passing judgment on the credibility of the cooperating witnesses. In any event, any potential error was cured by the district court's instruction to the jurors that they were the sole judges of witness credibility.

App. 8a-9a. The Circuit Court also vacated the $100,000 fine.

On February 14, 2008, Powell and Walker timely filed a petition for rehearing and rehearing *en banc*. The petition was denied on August 22, 2008. App. 33a.

REASONS FOR GRANTING THE WRIT

POINT I

Opinion Evidence from a Case Agent That His Extensive Investigation Permitted Him to Know Whether the Cooperators Were Truthful Is Inadmissible at a Federal Criminal Trial.

The Constitution and Federal Rules of Evidence do not allow the government to adduce opinion evidence as to the credibility of its witnesses, particularly informers whose credibility is suspect. The Second Circuit's decision that such evidence was admissible is at odds with established law in virtually every other United States Court of Appeals to decide the issue. In addition, the decision was such a gross departure from the accepted law (and sanctioned such a departure by the district court) as to warrant an exercise of this Court's supervisory power.

What makes informer testimony admissible is that it is subject to cross-examination and consideration by a well-instructed jury. *Hoffa v. United States*, 385 U.S. 293, 311 (1966)("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury."); *Banks v. Dretke*, 540 U.S. 668, 702 (2004)("This Court has long recognized the 'serious questions of credibility' informers pose"); *Napue v. Illinois*, 360 U.S. 264, 269

(1959)("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

The use of informers is a nearly constant feature of federal criminal trials in America. "The twin engines driving this massive cooperation machinery are the Federal Sentencing Guidelines and mandatory minimum sentences." Michael A. Simons, "Retribution for Rats: Cooperation, Punishment and Atonement." Vand. Law Rev. 1, 7 (2003). Their testimony uniformly includes detailed descriptions of their own criminal conduct and claims of knowledge of a defendant's criminal activities. Prosecutors and their agents typically amass information from a variety of sources to vet them. But the Due Process Clause prohibits the government from proving it used information to which the jury is not privy to determine the cooperators' truthfulness. This sort of evidence is virtually indistinguishable from improper vouching for a witness's credibility. *See United States v. Young,* 470 U.S. 1, 18 (1985)(vouching for witness credibility can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury).

The Federal Rules of Evidence permit a party to support a witness's credibility by opinion or reputation

but only if the witness's character has been attacked by opinion or reputation evidence. However, the evidence "may only refer to character for truthfulness or untruthfulness." Fed. R. Evid. 608(a).[1] Accordingly, Rule 608 does not permit a witness to opine that another witness was in fact truthful.

Rule 701 permits lay witnesses to give opinion evidence if it is rationally based on the perception of the witness and is helpful to a clear understanding of his testimony or to a determination of a fact in issue. Yet, lay opinion evidence is not admissible if it purports to be based on "scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. "Rationally based" means that the opinion is grounded in the witness' personal knowledge. *See United States v. Saulter*, 60 F.3d 270, 276 (7th Cir. 1995); Fed. R. Evid. 602. Information learned from police officers and cooperators is, by its very nature, second hand.

A case agent's opinion that his investigation put him in a position to determine whether his cooperators were truthful was not based on his perceptions of the cooperator's demeanor alone, *e.g.*, he appeared to be drunk, which is an example of opinion based on the

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1 An "attack" that consists only of counsel pointing out inconsistencies in testimony and arguing that the accused's testimony is not credible does not constitute an attack on the accused's reputation for truthfulness within the meaning of Rule 608. *United States v. Drury*, 396 F.3d 1303, 1315 (11th Cir. 2005).

witness's direct perception. Instead, this type of opinion is based on the agent's supposed knowledge of facts beyond those admitted at trial, including the contents of police reports, the impressions of police officers years after the events in question and interviews of suspects who may have had much to gain or lose from the answers sought. The agent's testimony was offered to prove that the agents determined before trial that their cooperators were telling the truth when they accused the defendants of committing the crimes charged in the indictment. This is not lay opinion at all but is really a type of specialized knowledge, admissible, if at all, as expert testimony.

Rule 702, of course, limits expert testimony to that adduced from an expert if it is based on sufficient facts or data, is the product of reliable methods and then only if the witness has applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702. Testimony purporting to prove a witness's truthfulness is never the proper subject of expert testimony, as the Tenth Circuit has pointed out:

> [E]xpert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not assist the trier of fact as required by Rule 702. Also, a proposed expert's opinion that a witness is lying or telling the truth might be inadmissible pursuant to Rule

> 702 because the opinion exceeds the scope of the expert's specialized knowledge and therefore merely informs the jury that it should reach a particular outcome. Yet another rationale for exclusion is that the testimony of impressively qualified experts on the credibility of other witnesses is prejudicial, unduly influences the jury, and should be excluded under Rule 403.

United States v. Benally, 541 F.3d 990, 995 (10th Cir. 2008) quoting *United States v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001); see also *United States v. Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999) ("[T]he credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical function of the jury--determining the credibility of witnesses.") (citing *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996)); *United States v. Cecil*, 836 F.2d 1431, 1441-42 (4th Cir. 1988)(en banc)(questions of credibility of witnesses are for the jury alone to determine); *United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988).

Indeed, in *United States v. Garcia*, 413 F.3d 201, 216 (2d Cir. 2005), the Second Circuit held that "the foundation requirements of Rule 701 do not permit a law enforcement agent to testify to an opinion so based and formed if the agent's reasoning process depended, in whole or in part, on his specialized training and experience." *Id.* The foundation requirements of Rule

701 are designed to "prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony set forth in Rule 702." *Id.* at 215. Trial courts "should be wary of opinion testimony whose sole function is to answer the same question that the trier of fact is to consider in its deliberations . . . to ensure that such testimony does not so usurp the fact-finding function of the jury." *Id.* at 201-211 (citations and quotations omitted); *accord Bank of China v. NBM, LLC*, 359 F.3d 171, 181 (2d Cir. 2004)(the purpose of Rule 701(c) is "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.").

The case agent's testimony was offered to answer the most important question in the trial, that is, whether the cooperators should be believed. The defendant could not have been convicted unless the jury believed them. This credibility question was central to the case. The agent's opinion was bolstered by Detective Dowling's testimony concerning the gathering of evidence and interviewing of witnesses from old criminal cases brought by local officers. The jury was left to conclude that the case agent and his team were in a better position to evaluate the cooperators' truthfulness because the agents had access to much more evidence. The admission of this testimony violated Powell's Sixth Amendment right to confrontation as it was based on testimonial information from witnesses who were not cross-examined. *See United States v.*

Mejia, 2008 U.S. App. LEXIS 20992 *48 (Oct. 6, 2008 2d. Cir.)(police investigator's reliance on out-of-court testimonial statements violated the Confrontation Clause).

The Circuit Court could not and did not find the admission of Tyrrell's testimony to be harmless error. The offending remarks poisoned the government's entire case inasmuch as it depended on the testimony of cooperating witnesses; there was little, if any, direct evidence aside from the cooperators' self-serving claims.

Defense counsel moved to strike the agent's improper opinion because the witness was improperly "passing judgment on the credibility of witnesses." The Circuit Court simply concluded: "It was within the district court's discretion to conclude that in so testifying Tyrrell was not passing judgment on the credibility of the cooperating witnesses." App. 8a. The panel attempted to construe the objection to its most narrow meaning but even this construction cannot save the panel's decision from a fundamental conflict with the rules of evidence, the defendant's due process right to a fair trial and to confrontation. There was no legitimate purpose for the jury to learn that agent's opinion that he knew the truth and whether the cooperators were truthful. The whole point of the case agent's testimony was to explain the legwork the agents had performed to verify the testimony of its cooperating witnesses. The jury was invited to rely on the agent's sworn testimony that the agents had spent innumerable hours investigating the case against

Powell and used this wealth of information the jury never heard to determine which potential cooperators were truthful in their inculpations of Powell. The agent testified that his team was required to disclose exculpatory information, thereby plainly implying that they would not call or rely on untruthful witnesses. This testimony was patently inadmissible under the rules of evidence and our Constitution. It poisoned the trial evidence.

In sum, this case presents the Court with an opportunity to clarify for the federal courts that such testimony is inadmissible at least on the government's case-in-chief. Since informer testimony is such a prominent feature of today's federal criminal trials, the Court has an interest is seeing to it that such testimony comports with the restrictions of the Rules of Evidence and the Constitution.

POINT II

The Government Must Prove a RICO Enterprise had an Ascertainable Structure.

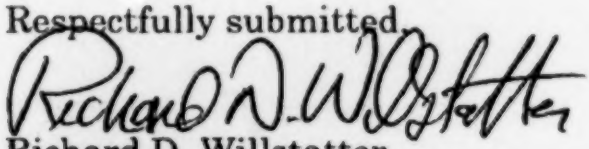
This Court will soon hear the case of *Boyle v. United States*, 07-1309, on the question of whether proof of an association-in-fact enterprise under the RICO statute, 18 U.S.C. §§ 1962(c)-(d), requires at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.

In Powell's case, there was evidence that the defendants engaged in criminal activity but proof of structure of the alleged enterprise was lacking. The defendant was alleged to have participated in several loosely-knit conspiracies over a ten-year period with a variety of people in numerous locations. The jury was not instructed that it had to find anything more than that there was an informal organization of people who associated together to commit crimes. We maintain that *United States v. Turkette*, 452 U.S. 576 (1981) requires that the government prove the existence of an enterprise having some ascertainable structure beyond the charged predicate acts. No such charge was given. Although this Point was not raised in the Court of Appeals, Boyle's writ of certiorari was granted after the Circuit Court denied Powell's rehearing petition. If this Court finds that proof of structure is required, the judgment of the Circuit should be vacated and remanded as such a new rule would apply to any case pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



Richard D. Willstatter
Counsel of Record
GREEN & WILLSTATTER
200 Mamaroneck Avenue, Suite 605
White Plains, New York 10601
(914) 948-5656

Dated: November 20, 2008

No. _____

In The

Supreme Court of the United States

OCTOBER TERM 2008

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QUINNE POWELL,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

SW

Appendix A - Order of the United States Court of Appeals for the Second Circuit, Filed January 23, 2008 [Pages 1a – 15a]

(ISSUED AS MANDATE: September 16, 2008)

05-6701 (Lead), 06-0132 (con)
USA v. Jones (Walker)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT http://www.ca2.uscourts.gov/), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of January, two thousand eight.

Appendix A
Order of the USCA for the Second Circuit]

PRESENT:

HON. ROBERT D. SACK,
HON. PETER W. HALL,
HON. DEBRA A. LIVINGSTON,
Circuit Judges.

United States of America,

Appellee,

v. Nos. 05-6701

(Lead),

06-0132 (con)

Damon Walker, aka Bucky, Quinne Powell,

Defendants-Appellants.

FOR DEFENDANT-APPELLANT WALKER: Todd A. Bussert, Law Office of Todd A. Bussert, New Haven, Connecticut.

FOR DEFENDANT-APPELLANT POWELL: Richard D. Willstatter, Green & Willstatter, White Plains, New York.

Appendix A
Order of the USCA for the Second Circuit]

FOR APPELLEE: Alina P. Reynolds, William J. Nardini, Assistant United States Attorneys (Kevin J. O'Connor, United States Attorney for the District of Connecticut, Alex V. Hernandez, Assistant United States Attorney, *on the brief*), Bridgeport, Connecticut.

Appeal from a judgment of the United States District Court for the District of Connecticut (Nevas, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED** in part and **REMANDED**.

Defendants-appellants Damon Walker and Quinne Powell appeal their convictions and sentences, following a jury trial, on charges of racketeering, racketeering conspiracy, conspiracy with intent to distribute and distribution of 50 grams or more of crack cocaine, witness tampering and, in the case against Powell, conspiracy to commit money laundering. Defendants raise ten issues on appeal, which include, *inter*

alia, improper admission of evidence, insufficiency of evidence to support certain convictions, that certain charges were barred by the statute of limitations, faulty jury instructions, violations of the Confrontation Clause, and sentencing concerns. The arguments with respect to improper admission of opinion evidence and violations of the Confrontation Clause are raised jointly, while the others are raised individually. For the following reasons, we affirm the convictions of both defendants and also Walker's sentence, and we remand to the district court for further proceedings with respect to Powell's sentence. We assume the parties are familiar with the facts, the procedural history, and the scope of the issues presented on appeal, which we reference only as necessary to explain our decision.

I. Walker's Arguments

Walker's primary argument is that there was insufficient evidence introduced at trial to support the witness tampering count because Jose Osorio seemed to recant his story about the alleged threat made to him by Walker. Osorio stated on direct examination that Walker had told him that he should "be careful [about talking to the authorities] because

everybody . . . in the streets [sic] gonna know about it and you will be taken care of." Osorio indicated on cross, re-direct, re-cross, and re-re-direct examination that Walker had merely told him that he should "just maintain and don't say nothin,' or whatever." While it is true that one could draw the inference from Osorio's later testimony that Walker's message to him was not threatening, it was equally reasonable for the jury to draw the inference that Walker did, in fact, threaten Osorio. We must defer "to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998). Walker has not met the "heavy burden" of challenging his conviction on this ground. *United States v. Feliciano*, 223 F.3d 102, 113 (2d Cir. 2000).

Walker's remaining arguments lack merit as well. First, it was not an abuse of discretion for the district court to admit evidence of 1996 and 1998 acts not charged in the indictment, because even if these acts were not in furtherance of the larger conspiracy, see, e.g., *United States v. Thai*, 29

F.3d 785, 812 (2d Cir. 1994), the testimony in question was offered for a proper purpose, was relevant to whether Walker was in the narcotics trafficking business, was more probative than prejudicial, and was followed by the court's administration of the required limiting instruction, see *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002). Second, Walker's argument that there was insufficient evidence presented to show that the substance seized from Walker was crack cocaine lacks merit. "[T]he jury's verdict may be based entirely on circumstantial evidence." *United States v. Sureff*, 15 F.3d 225, 228 (2d Cir. 1994). Here, that evidence included both the testimony of cooperating witnesses that the purpose of the conspiracy was distributing crack cocaine and the testimony of law enforcement officers who recognized that the substance seized was in fact crack. Finally, we reject Walker's sentencing arguments because: (1) his briefs do not point to any error in the district court's decision to reject his argument and apply the "use of a minor" enhancement under U.S.S.G. § 3B1.4; (2) Application Note 8 of U.S.S.G. § 3C1.1 advises that if a defendant is "convicted both of an obstruction offense . . . and an underlying offense," the two

counts should be grouped and the offense level for the underlying offense should be increased by two levels; and (3) Walker's prior conviction need not have been placed before a jury under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and *United States v. Booker*, 543 U.S. 220, 244 (2005) ("Any fact (*other than a prior conviction*) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (emphasis added)).

II. Powell's Arguments

Powell also raises a number of arguments on appeal. The first category we address is his claim that he was denied a fair trial. He asserts four bases for this broad argument: (1) the court permitted Special Agent Milton Tyrrell to opine on the credibility of the government's cooperating witnesses; (2) the court permitted officers to offer scientific opinion testimony with respect to the results of various narcotics field tests; (3) the government suggested during summation that cooperating witness Joseph DePalo was facing charges in connection with offenses related to the conspiracy; and (4) the

government told the jury during summation that Osorio had confused his testimony about the dates when he was threatened by Powell not to cooperate with the government. Only the first of these arguments was also made before the trial court. All of them lack merit.

It was not an abuse of discretion to allow Agent Tyrrell's testimony at trial. See *United States v. Dwyer*, 539 F.2d 924, 927 (2d Cir. 1976) (decisions about whether to exclude relevant evidence are reviewed for abuse of discretion). Tyrrell was describing generally the process of locating and debriefing cooperating witnesses when he said that "90 [to] 95 percent of [the] time we know if they're telling the truth or not. If they're not, you know, we'll . . . sit down, you know, we'll step away and we'll figure out what we're going to do. But in this investigation, most of the guys that – the cooperators that we dealt with, we had – an excellent idea of what was going on, you know, in P.T. Barnum." It was within the district court's discretion to conclude that in so testifying Tyrrell was not passing judgment on the credibility of the cooperating witnesses. In any event, any potential error was cured by the district court's

instruction to the jurors that they were the sole judges of witness credibility.

The other arguments asserting that Powell was denied a fair trial fail to demonstrate plain error. See Fed. R. Crim. P. 52(b); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (applying "plain error" standard of review to unpreserved claims of error). The officers who testified about the seized narcotics acknowledged that their testimony was based on their experience as police officers. Moreover, the jury was instructed that police officer testimony should be given no greater weight than testimony of any other witness. We must presume that the jury followed that instruction. See *United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002). The government's comment during rebuttal summation that DePalo could be facing charges was an appropriate response to defense counsel's earlier suggestion in its closing argument that DePalo was not charged because of his race. The suggestion by the government during summation that Osorio had mistakenly testified that the threat to him was made in February 2000 instead of February 2001 was within the wide range of inferences the government was entitled to suggest in

closing. See *United States v. Casamento*, 887 F.2d 1141, 1189 (2d Cir. 1989) ("The government has broad latitude in the inferences it may reasonably suggest to the jury during summation.").

Powell's remaining arguments, in addition to those already discussed asserting denial of a fair trial, are also raised for the first time on appeal. He argues that the jury instructions on Racketeering Act 3 were insufficient to assure unanimity. He fails to show that the instruction was in error, much less plain error, because he cannot demonstrate that Racketeering Act 3 involved a "complexity of the evidence or other factors [that] create[d] a genuine danger of jury confusion," such that the general unanimity instruction given was insufficient. *United States v. Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986). Powell argues for the first time that the limitations period for the drug possession count of the indictment had expired. As this affirmative defense was not raised below, we will not consider it on appeal. See *United States v. Walsh*, 700 F.2d 846, 855-56 (2d Cir. 1983). He also contends that there was insufficient evidence to support the witness tampering count against him because Osorio testified

that he was threatened by Powell in February 2000, whereas he and Powell were not at the same correctional facility at that time. Powell fails to recognize, however, that evidence was introduced at trial indicating the two of them were together at the Bridgeport Correctional Center in February 2001. Viewing the evidence on this point in the light most favorable to the government, as we must, see *Morrison*, 153 F.3d at 49, a rational trier of fact could conclude that Osorio misspoke when he stated that he and Powell were together in February 2000 and that the threat was actually made in February 2001.

Powell contends further that his rights under the Confrontation Clause were violated when he was not allowed to question two cooperating witnesses about details of their acts underlying charges pending against them. For the district court to limit questioning of these witnesses about these acts does not constitute plain error. See Fed. R. Crim. P. 52(b); *Johnson*, 520 U.S. at 466-67. It is within the clear authority of the trial judge to limit cross-examination, see *United States v. Flaharty*, 295 F.3d 182, 190-91 (2d Cir. 2002), and it was appropriate to do so here in view of the witnesses' Fifth

Amendment rights. To the extent that the court limited those areas of inquiry, it also had broad discretion to do so because the "probative value [of the evidence was] substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury," Fed. R. Evid. 403, especially because counsel was permitted to inquire into the witnesses' prior bad acts and the nature (if not the specifics) of the pending charges.

Powell's final argument is that the district court erred in imposing on him a $100,000 fine without explaining the reasons for the fine or why it found that Powell has the ability to pay the fine. On this point we agree with Powell. Section 5E1.2(a) of the Guidelines states that a sentencing court should impose a fine "except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." The district court must "state in open court the reasons for its imposition of the particular sentence," 18 U.S.C. § 3553(c), and must "consider . . . the defendant's income, earning capacity, and financial resources" in imposing a fine, 18 U.S.C. § 3572(a)(1). "Our case law has recognized that the defendant bears the burden to show

indigence that will avoid imposition of a fine." *United States v. Corace*, 146 F.3d 51, 56 (2d Cir. 1998). This burden may be "satisf[ied] either by independent evidence or by reference to the Presentence Report." *United States v. Thompson*, 227 F.3d 43, 45 (2d Cir. 2000). This Court has "observed that once indigence has been shown, 'the discretion vested in sentencing courts . . . to waive a fine . . . should generally be executed in favor of such a waiver.'" *Corace*, 146 F.3d at 56 (quoting *United States v. Wong*, 40 F.3d 1347, 1383 (2d Cir. 1994) (ellipses in original)). Thus, if the defendant establishes a colorable basis for believing he does not have the ability to pay a fine, "[t]he sentencing court may not base the imposition of a fine on its mere suspicion that the defendant has funds," *United States v. Rivera*, 22 F.3d 430, 440 (2d Cir. 1994), but must make a finding as to the defendant's ability to pay, see *Corace*, 146 F.3d at 57.

In the instant case, contrary to the government's contention, Powell met his burden of proving indigence by referencing the PSR's finding that "it does not appear that he has the ability to pay a fine within the guidelines range." That being the case, the district court needed to articulate

findings regarding Powell's ability to pay the $100,000 fine assessed. It did not do so but instead admonished Powell: "You don't want to work. . . . You just want easy money." The district court's observation that Powell "made a lot of money" from his crimes, however, is not a factual finding that Powell is presently capable of paying a fine or will become capable of paying in the future.

Thus, whether Powell is not or will not become financially solvent is an open question, and in accordance with *United States v. Aregbeyen*, 251 F.3d 337, 339 (2d Cir. 2001) (per curiam), we remand this matter to the district court for it to supplement the record with "specific findings regarding [Powell's] ability to pay." See id. (remanding for "specific findings regarding [defendant's] ability to pay" a fine when grounds for district court's finding that he could pay were unclear from the record before this Court).

The judgment of the District Court with respect to Defendant Walker is hereby **AFFIRMED**. The judgment of the District Court with respect to Defendant Powell is hereby **AFFIRMED** in part, and the case is **REMANDED** to the District Court so it may clarify the basis for imposing a

$100,000 fine on Powell. This remand is pursuant to the procedure outlined in *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994). The District Court, on remand, should amend its judgment to include a written statement of the specific reasons for the fine imposed against Powell and, if it sees fit, may further develop the record with regard to Powell's present financial condition and his predicted earnings capacity. Within ten days after the District Court concludes proceedings pursuant to this remand order, either party to those proceedings (Defendant Powell or the Government) may restore jurisdiction to this panel by giving notice to the Clerk of Court. See *Jacobson*, 15 F.3d at 22.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By:_____

Appendix B – Opinion of the United States District Court for the District of Connecticut, Filed September 7, 2006 [Pages 16a – 32a]

UNITED STATES OF AMERICA
v. QUINNE POWELL

Crim. NO. 3:99cr264 (AHN)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2006 U.S. Dist. LEXIS 68569

September 7, 2006, Filed

SUBSEQUENT HISTORY: Findings of fact/conclusions of law at United States v. Foster, 2006 U.S. Dist. LEXIS 84660 (D. Conn., Nov. 14, 2006)

PRIOR HISTORY: United States v. Jones, 455 F.3d 134, 2006 U.S. App. LEXIS 16747 (2d Cir. Conn., 2006)

COUNSEL: [*1] For Luke Jones also known as Mega, Defendant: Charles E. Tiernan, III, Lynch, Traub, Keefe & Errante, New Haven, CT; Robert M. Casale, Branford, CT.

For Lance Jones, Defendant: Kevin A. Randolph, Law Offices of Kevin A. Randolph, Glastonbury, CT.

Appendix B
[Opinion of the USDC for the District of Connecticut]

For Aaron Harris, also known as Dog, also known as Toast, also known as DMX, also known as Hit Man Sosa, Defendant: Peter J. Schaffer, Stamford, CT.

For Leonard Troy Jones also known as X, Defendant: Eroll V. Skyers, The Barrister Law Group, Bridgeport, CT.

For Lyle Jones also known as Speedy, Defendant: Eroll V. Skyers, The Barrister Law Group, Bridgeport, CT; Muhammad Ibn Bashir, Elizabeth, NJ.

For Willie Nunley also known as Man, Defendant: Jonathan J. Einhorn, New Haven, CT.

For Craig Baldwin also known as One Eye Craig, Defendant: Bruce D. Koffsky, Stamford, CT.

For Rasheen Lewis, also known as Rasheed Lewis, also known as Noriega, also known as Francis G. Sheen, Defendant: David L. Lewis, Lewis & Fiore, New York, NY.

For Kevin Jackson also known as Kong, Defendant: Michael Stanton Hillis, Dombroski, Knapsack & Hillis, New Haven, CT.

For Leslie Morris also known as BooBoo, Defendant: John T. [*2] Walkley, Monroe, CT.

For Quinne Powell, also known as Q, also known as One Letter, Defendant: Rudolph Findley Miller, William Keefe, Jamaica Plain, MA.

Appendix B
[Opinion of the USDC for the District of Connecticut]

For Damon Walker also known as Bucky, Defendant: Todd Allen Bussert, New Haven, CT.

For Rayon Barnes, Defendant: Richard S. Cramer, Wethersfield, CT.

For US Court of Appeals, Notice: US Court of Appeals, Office of the Clerk, US Courthouse, New York, NY.

For Joseph Gormley, Honorable, Michael Hartmere, Honorable, John P. Maiocco, Jr., Honorable, Interested Parties: Philip Miller, Attorney General's Office, Hartford, CT.

For USA, Plaintiff: Alex V. Hernandez, Alina Reynolds, U.S. Attorney's Office, Bridgeport, CT; James I. Glasser, U.S. Attorney's Office, New Haven, CT.

JUDGES: Alan H. Nevas, United States District Judge.

OPINION BY: Alan H. Nevas

OPINION

RULING ON MOTION FOR NEW TRIAL

On June 3, 2005, a jury convicted defendant Quinne Powell ("Powell") on eight counts: Count One, racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c); Count Two, RICO conspiracy, in violation of 18 U.S.C. § 1962(d); Counts Three, [*3] Four, and Six, conspiracy to possess with

intent to distribute and to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1)(B) and (b)(1)(A) and 21 U.S.C. § 846; and Counts Nine and Twelve, Obstruction of Justice for witness tampering, in violation of 18 U.S.C. § 1512(b)(3); Count Thirteen, conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(a)(1). Following his conviction, Powell filed the instant motion for a new trial under Fed. R. Crim. P. 33. The court held oral argument on the motion on December 21, 2005, and orally denied the motion before sentencing Powell. This ruling provides a more detailed explanation of the court's decision to deny Powell's motion.

STANDARD

Under Fed. R. Crim. P. 33(a), this court "may vacate any judgment and grant a new trial if the interest of justice so requires." Although this court has broad discretion in considering a motion for a new trial, it should exercise its authority under Rule 33 "sparingly" and in "the most extraordinary circumstances. [*4] " *United States v. Ferguson,* 246 F.3d 129, 134 (2d Cir. 2001) (quoting *United States v. Sanchez,* 969 F.2d 1409, 1414 (2d Cir. 1992)). In considering this motion, the court must "defer to the jury's resolution of conflicting evidence and assessment of witness credibility," and, therefore, "[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." *Id.* at 133-34 (quoting *Sanchez,* 969 F.2d at 1414). "The ultimate test . . . is whether letting a guilty verdict stand would be a manifest injustice." *Id.* at 134. There must be a real concern that an innocent person may have been convicted. *See id.* The defendant bears the burden of persuading the court that a new

trial is necessary and appropriate. *United States v. Sasso,* 59 F.3d 341, 350 (2d Cir. 1995).

DISCUSSION

Powell contends that he is entitled to a new trial on four different grounds. First, he contends that he was prejudiced by the court's admission of physical evidence related to the P.T. Barnum drug trafficking conspiracy ("the Barnum Conspiracy"), the activities [*5] of Lonnie and Lance Jones ("the Jones Brothers"), and the heroine seized by the New York Police Department in the Bronx ("the Bronx seizure"). Second, Powell maintains that the RICO predicate of conspiracy to murder the Trumbull Gardens Terrace gang members ("Terrace Crew members") is not supported by the evidence and is inconsistent with the jury's verdicts on other counts. Third, he argues that racketeering act 5 and his conviction on count nine, which both involve obstructing justice by tampering with a witness, are not supported by the evidence. Finally, he contends that the government failed to prove at trial that the cocaine seized was crack cocaine. The government chose not to brief the first three grounds Powell asserted, but did challenge the fourth ground, arguing that it need not introduce results of scientific tests to establish that the substance seized was, in fact, crack cocaine. [1] After reviewing these arguments, the evidence adduced at trial, and the law, the court concludes that none of Powell's claims entitle him to a new trial under Rule 33(a).

1 The government's Memorandum of Law in Opposition to Defendant Quinne Powell's Motion for Judgment of Acquittal [dkt. # 1986] makes no

substantive arguments, but only refers the court to the government's memorandum [dkt. # 1974] regarding the motion for acquittal, and alternatively a new trial, filed by Powell's co-defendant, Damon Walker. The government's memorandum regarding Walker, however, simply does not address the first three grounds for acquittal cited by Powell.

[*6] A. *Admission of Evidence of the Barnum Conspiracy, the Jones Brothers, and the Bronx Seizure*

Powell first argues that the court erred in admitting evidence of the Barnum Conspiracy, the activities of the Jones Brothers, and the Bronx seizure because "the government failed to show any evidence of [a] nexus between Powell and these defendants (and criminal activity)." Powell summarily complains that the court admitted "physical evidence from the Jones [Brothers] (and the P.T. Barnum development) guns, bullet proof vests, masks and other contraband items," and that this evidence was "damaging and prejudicial." Although the government offers no response to Powell's claims, the court nevertheless finds that this evidence was properly admitted.

Powell's generalized objections to the admission of evidence of the Barnum Conspiracy, the activities of the Jones Brothers, and the Bronx seizure can be addressed together because Powell, in essence, complains that he was prejudiced by the admission of evidence relating to the activities of his alleged coconspirators. It is well-settled, however, that a defendant need not join in every unlawful objective of a conspiracy for the defendant [*7] to be considered a member of the conspiracy, as long as the

defendant shared "some knowledge of the conspiracy's unlawful aims and objectives." *United States v. Salameh,* 152 F.3d 88, 147 (2d Cir. 1998) (citing *United States v. Heinemann,* 801 F.2d 86, 93 (2d Cir. 1986)). "Once a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming." *United States v. Casamento,* 887 F.2d 1141, 1156 (2d Cir. 1989), *cert. denied,* 479 U.S. 1017, 107 S.Ct. 668, 93 L.Ed.2d 720 (1986). "A lack of evidence connecting one defendant with others does not preclude a determination that all the defendants were coconspirators . . . so long as each defendant knew from the scope of the operation that others were involved in the performance of functions vital to the success of the endeavor." *Id.* at 1157-58.

All of the evidence of which Powell complains involved his alleged coconspirators. The evidence of the Barnum Conspiracy and the Bronx seizure involved Aaron Harris, who the government alleged was Powell's coconspirator in counts two, three, thirteen, and racketeering acts [*8] 1-A, 1-C, 2-A, and 3. The evidence of the Bronx seizure also involved Kenneth Richardson, who the government alleged was Powell's coconspirator in counts two and six. Likewise, the government alleged that the Jones Brothers were Powell's coconspirators in count two and racketeering act 1-C in count 1. In addition, the government alleged that Lance Jones was Powell coconspirator in count six. Because these individuals were Powell's alleged coconspirators, the evidence of their activity was relevant and admissible under Fed. R. Evid. 403 as proof of Powell's involvement in the conspiracies of which he was charged. *See Iannelli v. United States,* 420 U.S. 770, 777 n. 10, 95 S.Ct. 1284, 1289 n. 10, 43 L.Ed.2d 616 (1975)

(stating that because a conspiracy is, by its nature, clandestine, a conspiracy is often be proved by circumstantial evidence). Thus, it was appropriate for the jury to consider this evidence in determining Powell's guilt or innocence with regard to the charged conspiracies. [2]

2 For example, as to racketeering act 1-C, the court charged the jury that:

> [A] defendant need not have joined in all the conspiracy's unlawful objectives. The extent of a defendant's participation has no bearing on the issue of the defendant's guilt. Indeed, each member may perform separate and distinct acts, and may have performed [them] at different times. Some conspirators play major roles, others play minor parts in the scheme. An equal role is not what the law requires.

In addition, the court's charge with regard to the conspiracies stated that:

> Further, when people enter into a conspiracy to accomplish an unlawful end, they become agents or partners of one another in carrying out the conspiracy. Accordingly, in determining the factual issues before . . . you, you may consider as evidence against the defendant . . . any acts or statements made by any of his co-conspirators, even though such acts or

statements were not made in his presence, or were made without his knowledge.

[*9] Moreover, the jury's verdict belies Powell's claims of prejudice. After weighing the evidence of the drug-related activities at the P.T. Barnum Housing Project in racketeering act 1-C, the jury found that the government failed to prove Powell's involvement in the Barnum Conspiracy. This verdict demonstrates that the jury distinguished between the activities of Powell and those of his alleged coconspirators. Therefore, the court finds that the admission of evidence of the Barnum Conspiracy, the activities of the Jones Brothers, and the Bronx seizure was not a "manifest injustice," *see Ferguson*, 246 F.3d at 134, and declines to order a new trial.

B. *Sufficiency of Evidence for Conspiracy to Murder the Terrace Crew Members*

Powell next argues that the court should vacate the jury's verdict finding him guilty of racketeering act 3 for conspiracy to murder the Terrace Crew members. The court is not persuaded by Powell's claims.

In addition to charging Powell with conspiracy to murder the Terrace Crew members as a racketeering act, the indictment alleged as racketeering acts 4-A, 4-B, and 4-C, that Powell murdered Kevin Guiles, attempted to murder Brian Matthews, [*10] and attempted to murder Kendall Willis. The jury found Powell not guilty on all three of these racketeering acts. According to Powell, the jury could not have reasonably found that the government proved racketeering act 3, the conspiracy to murder the Terrace Crew

members, while also finding that the government did not prove either the murder or attempted murder of the Terrace Crew members. Again, the government fails to address this argument. Nonetheless, Powell's argument that the jury could not have convicted him of conspiracy if it did not also convict him of the objectives of that conspiracy is contrary to well-settled law.

"It has been long and consistently recognized . . . that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States*, 328 U.S. 640, 643, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). As such, the jury was correctly charged to consider conspiracy and the underlying objectives of that conspiracy as separate crimes:

> The crime of conspiracy to violate a federal law is an independent offense. It is separate and distinct from the actual violation of any specific federal law, which . . . the law refers [*11] to as substantive crimes. Indeed, you may find a defendant guilty of conspiracy to commit an offense against the United States even though the substantive crime which was the object of the conspiracy, was not actually committed, or it may have failed.

The jury was presented with sufficient evidence that Powell, along with one or more of his coconspirators, Aaron Harris, Damon Walker, and Craig Baldwin, conspired to murder the Terrace Crew members. That evidence demonstrated a rivalry between Powell and his coconspirators and the Terrace Crew

members that violently escalated due to personal vendettas and drug-related turf wars. Specifically, the government presented the testimony of multiple witnesses, including Robert Rogers, Issac Wadsworth, Takiyah Cato, and Sean Valentine, that detailed multiple altercations and shootings between Powell's coconspirators and the Terrace Crew members. One witness, in particular, Tawanna Allen, implicated Powell by describing a conversation she had with Powell and Aaron Dennis outside of the Pequonnock Housing Project where Brian Matthews, a member of the Terrace Crew, stayed. [3] During that conversation, Dennis asked Allen to prop open the [*12] back entrance to a building at the Pequonnock Housing Project to provide Dennis admittance later that night. Allen agreed and propped open the door when she left the building that evening. Later that night Matthews was found murdered in the Pequonnock Housing Project. Viewed in total, this evidence sufficiently supported the jury's finding that Powell conspired to murder the Terrace Crew members beyond a reasonable doubt. Therefore, the court declines to order a new trial under Rule 33(a) on this ground.

> 3 Allen had previously testified before the grand jury that the individual who was with Powell when the conversation occurred was Aaron Harris, Powell's coconspirator. At trial, however, she stated that she erred in her testimony before the grand jury, and that the individual with Powell was actually Aaron Dennis.

C. *Sufficiency of the Evidence for Obstruction of Justice*

Powell also argues that the evidence was insufficient to support a conviction for obstruction of justice by tampering

with a witness as [*13] alleged in count nine and racketeering act 5 and maintains that the court should enter a verdict of not guilty on count nine and strike racketeering act 5 as a supporting predicate for the RICO and RICO conspiracy crimes alleged in counts one and two. [4] The allegations supporting these charges are that Powell obstructed justice by threatening Jose Osorio ("Osorio"), a drug dealer involved with Powell, to prevent Osorio from continuing to cooperate with law enforcement. Again, the government does not respond to Powell's argument. The court, however, finds that Powell's obstruction of justice charge was sufficiently supported by the evidence and declines to order a new trial.

> 4 Although Powell filed this motion as one for a new trial under Fed. R. Crim. P. 33, his requests to enter a verdict of not guilty on count nine and strike racketeering act 5 are more appropriate for a motion of acquittal under Fed. R. Crim. P. 29. Nonetheless, the court considers Powell's requests with respect to count nine and racketeering act 5 under the more lenient standard of review for a Rule 33 motion. *See Ferguson*, 246 F.3d at 134 (noting that the court has broader discretion to grant a new trial under Rule 33 than to order an acquittal under Rule 29). If his motion for a new trial fails - as it must based on the evidence presented at trial - then Powell's requests for acquittal with respect to count nine and racketeering act 5 must also fail.

[*14] At trial, Osorio testified that he encountered Powell at the Bridgeport Correctional Center ("BCC") in February

2000, and Powell threatened him by saying that he would not be safe if he cooperated with the government. [5] Powell does not dispute that this incident, if it occurred, would be sufficient to support the jury's finding that Powell obstructed justice, as alleged. [6] Instead, Powell contends that this evidence was insufficient to support the jury's verdict because "the evidence clearly show[s] that Mr. Powell was not at [the BCC] at the time Mr. Orsorio claims that this [alleged intimidation] took place." Powell seems to base his contention on the testimony of Officer Henry Falcone of the Connecticut Department of Corrections ("Falcone"). Relying on information gleaned from records of the Department of Corrections, Falcone testified that Powell was held at the BCC from December 5, 2000 until March 28, 2002, and that Osorio was at the same facility from October 12, 2000 until April 16, 2001. Falcone's testimony conflicted with Osorio's testimony only to the extent that Osorio claimed that the encounter with Powell occurred at the BCC in February 2000. Thus, according [*15] to Falcone, the alleged obstruction could have only occurred between December 5, 2000 and April 16, 2001.

5 Osorio testified that Powell said:

> It ain't like no one gonna ever know [you are cooperating] because they got paperwork so they know who is talkin', who's not talkin['], and you know - they gonna know everybody names, so you ain't gonna be safe or nothin'. So, I don't know why, you know, everyone thinkin' they're talkin' they're gonna be safe, like you're

> gonna be private forever. They're gonna eventually know.

6 Osorio testified that he understood Powell's "threat" to mean that he "would get hurt in jail or either on the streets." This interpretation is certainly reasonable. Powell's statement that "it ain't like no one gonna ever know" that Osorio was cooperating with the government and that Osorio "ain't gonna be safe or nothin'" or "gonna be private forever" implies a threat of physical violence; the statement that "they gonna know everybody names" and "[t]hey're gonna eventually know" implies that individuals would be willing to enforce the threat. Osorio's testimony thus constitutes the "competent, satisfactory and sufficient evidence" in the record that must support a jury verdict to withstand a motion for a new trial. *See Ferguson*, 246 F.3d at 134.

[*16] But this discrepancy does not warrant a new trial. It is possible that the jury credited Osorio's account, including his testimony about the date of the encounter with Powell. It is just as possible that the jury believed that the encounter with Powell occurred as Osorio testified, but that Osorio was wrong about the date of the encounter. At any rate, both Osorio and Falcone testified that Powell and Osorio were held at the BCC during the five month period beginning December 5, 2000. Regardless of which possible scenario the jury believed, Powell's objection to this discrepancy in the evidence goes to the credibility of Osorio and Falcone's respective testimony, rather than to the sufficiency of the evidence. Because the court must "defer to the jury's

resolution of conflicting evidence and assessment of witnesses' credibility" except in extraordinary circumstances, *See Ferguson,* 246 F.3d at 133-34, the court declines to second guess the jury's conclusion.

Even if the court were to credit Falcone's testimony over Osorio's, however, a new trial would still be inappropriate because Falcone's testimony bolstered Osorio's account of the encounter with Powell. Falcone [*17] testified that the BCC has a recreational facility, which is where Osorio alleged the encounter took place, and Falcone stated that given the freedom of movement afforded prisoners, Osorio and Powell could have met at that recreational facility. Therefore, jurors could have reasonably credited Osorio's description of Powell's efforts to intimidate him, despite his error about the date of the encounter. Given the totality of the evidence on this issue, it was reasonable for the jury to conclude beyond a reasonable doubt that Powell intimidated Osorio during the five months that the two prisoners were held at the BCC.

D. *Sufficiency of Evidence of the Crack Cocaine Conspiracy*

Powell finally claims that the government failed to present any evidence that the substance distributed as part of the charged "East Side Conspiracy" or "Greens Homes Housing Project Conspiracy" was crack cocaine, that is, cocaine base within the meaning of 21 U.S.C. § 841(b)(1)(A)(iii). Specifically, Powell maintains that the government's evidence was insufficient to prove that the substance was crack cocaine because the DEA's forensic chemist testified that the results of the tests [*18] he performed on the seized cocaine were consistent with cocaine in its naturally occurring alkaloid form, and that the substance was not necessarily crack

cocaine. Thus, Powell argues that the government failed to produce any reliable, direct evidence concerning drugs seized from the various trafficking operations.

Powell cites no authority that requires the government to prove a drug conspiracy by direct scientific evidence rather than circumstantial evidence. As the government points out, federal law does not generally distinguish between direct and circumstantial evidence, and permits a conviction based solely on the latter. *See United States v. Alameh,* 341 F.3d 167, 173 (2d Cir. 2003). Indeed, the Supreme Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 100, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). Nor has this general principle been abandoned for drug prosecutions. In *United States v. Crisp,* 563 F.2d 1242 (5th Cir. 1977), the court held that "[t]he nature of a narcotic drug . . . may be established by [*19] circumstantial evidence, so long as the drug's identity is established beyond a reasonable doubt." *See id.* at 1244. Although laboratory testing may be quite helpful to the jury in resolving reasonable doubts the jurors may have, such scientific procedures are not essential for the government to prove the existence of an agreement to distribute a particular type of narcotic. *See Desert Palace,* 539 U.S. at 100.

Even in the absence of such scientific testing on the seized narcotics, the circumstantial evidence presented by the government during Powell's trial was so extensive that a reasonable jury could find beyond a reasonable doubt that Powell conspired to distribute crack cocaine. Two experienced police officers, William Mayer ("Mayer") and

Appendix B
[Opinion of the USDC for the District of Connecticut]

Glen Cassone ("Cassone"), both examined drugs seized during the arrests of various members of the drug-trafficking ring. Mayer testified that cocaine is a pure, white powder, while crack cocaine is a chunkier, off-white substance, and based on his 18 years of experience, the substances recovered were crack cocaine. Cassone also testified that the drugs seized were "rocky" substances consistent with crack cocaine. [*20] In addition, both officers conducted chemical field tests on the substances which yielded positive results for crack cocaine.

The central role of crack cocaine in the drug-trafficking operation was also demonstrated by the testimony of four different drug dealers who described the drug and its packaging. Jose Osorio, Oretegus Eaddy, John Glover, and Quadan Thompson each testified that they sold pink-top vials filled with crack as part of the drug-trafficking conspiracy. In sum, the testimony of these six witnesses, including two experienced police officers who conducted field chemical tests, is more than sufficient to prove beyond a reasonable doubt that Powell conspired to distribute crack cocaine, and thus there is no basis for the court to overturn the jury's verdict on counts three and four.

CONCLUSION

For the foregoing reasons, the court denies Powell's motion for a new trial [dkt. # 1872].

Alan H. Nevas

United States District Judge

Appendix C - Order of the United States Court of Appeals for the Second Circuit on Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of August two thousand and eight,

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United States of America,

Appellee,

v.

Damon Walker, aka Bucky, Quinne Powell,

Defendants-Appellants.

ORDER
No. 05-6701-cr

Damon Walker, Quinne Powell having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: _____
Frank Perez, Deputy Clerk